In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

J. W. ROMAINE and MARTHA B. ROMAINE, His wife; FRED J. WOOD and ANNA WOOD, His wife; ROBERT SHIELDS and AUGUSTA J. SHIELDS, His wife; ESTATE OF M. J. CLARK, ELLEN CLARK, His widow, PHILIP CLARK and MRS. SAMUEL MAYHEW, Together with the Executor of the Estate of said M. J. CLARK and the Heirs at law thereto when the same shall be determined; C. M. ADAMS and BELLE M. ADAMS, His wife; JOHN WILLIAMS; MATILDA FRANCES, EDWARD WARBASS; PHILIP BOB; HARRY PRICE; HENRY SENIOR and DANIEL CUSH, and all persons claiming an Interest in the Property herein described, *Appellees*.

No. 3153.

Appeal from the United States District Court for the Western District of Washington, Northern Division

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BRIEF FOR THE APPELLEES

FILED

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In the United States Circuit Court of Appeals

For the Ninth Circuit

The United States of America, *Appellant*, vs. J. W. Romaine and Martha B. Romaine, His wife; Fred J. Wood and Anna Wood, His wife; Robert Shields and Augusta J. Shields, His wife; Estate of M. J. Clark, Ellen Clark, His widow, Philip Clark and Mrs. Samuel Mayhew, Together with the Executor of the Estate of said M. J. Clark and the Heirs at law thereto when the same shall be determined; C. M. Adams and Belle M. Adams, His wife; John Williams; Matilda Frances, Edward Warbass; Philip Bob; Harry Price; Henry Senior and Daniel Cush, and all persons claiming an Interest in the Property herein described, *Appellees.*	No. 3153.

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BRIEF FOR THE APPELLEES

ARGUMENT

THE FACTS

On January 22, 1855, the treaty involved in this action was made. Its only reference to the lads in question is contained in Article II, wherein it provides: "There is, however, reserved for the present use and occupation of said tribes and bands, the following tracts of land, viz, * * * and the island called Chah-choo-sen, situated in the Lummi river at the point of separation of the mouths emptying respectively in Bellingham Bay and the Gulf of Georgia, all which tracts shall be set apart and so far as necessary surveyed and marked out for their exclusive use * *" (Plaintiff's Exhibit 9.) Abbott's Real Property Statutes, Washington Terr., pp. 1123, 1124.

On August 16, 1873, a contract was entered into between the Surveyor General of the United States for Washington Territory, for and on behalf of the United States, and J. M. Snow, et al, for the survey and marking of the exterior boundaries of the Lummi and other reservations, in pursuance of appropriation for such purpose made by Congress on March 3, 1873. (Defendants' Exhibits "F" and "G.")

In October, 1873, the exterior boundaries of the Lummi Indian Reservation were surveyed and marked and platted by J. M. Snow, Deputy U. S. Surveyor. (Trans. 93).

He was engaged about six weeks in making the survey, and was taken to and from the village about twice a week and camped there about a week, talked with the Indians on the Reservation, meeting them at the village and scattered around where they lived on the Reservation at various points; told them his mission. The Indians followed him around and asked questions as to what he was doing and why he was doing it; that he made it a point to explain to them as to what he was doing there and why; that no suggestion was ever made by any of the Indians that the Reservation extended to Treaty rock or that the mouth of the river was at Treaty rock, or that any of the land which lay to the eastward of the line marked 1889 to 1908 (Plaintiff's Exhibit 4) belonged to the Reservation or should be included in its exterior boundaries.

Testimony *Snow,* (Tr. 149-50).

On November 22, 1873, President Grant issued his executive order relative to the reservation. (Trans. 5). Statutes at Large, Vol. 12, p. 928.

In 1874 the surveys made by Snow in pursuance of his contract, were examined and approved by the United States Surveyor General, and became a

matter of public record. (Defendants' Ex. "G.").

In 1883 H. B. Stewart, U. S. Deputy Surveyor, acting under instructions from the Commissioner of the General Land Office at Washington, to the Surveyor General of Washington Territory, and instructions from the Surveyor General of Washington Territory to said H. B. Stewart, re-surveyed the reservation for the purpose of allotments, which survey so returned by him was on June 22, 1884, examined and approved by the United States Surveyor General at Olympia, and became a matter of public record. (Defendants' Ex. "K").

In 1873 the western mouth of the Lummi or Nooksack river emptied into the Gulf of Georgia. (Testimony Jos. M. Snow. Tr. 104). The main river emptied into Bellingham Bay through its eastern mouth.

The location of two cottonwood trees, roughly estimated at 40 ft. high, are shown upon plaintiff's Exhibit 4.

Testimony *Geo. R. Campbell* (Tr. 53).

It will be observed that they are situated on the east side of the river on the Hedge Donation Claim, approximately opposite the North line of Section 18. The original Indian village in 1873 was located on the west side of the river about abreast of the cottonwood trees.

Testimony *Tawes* (Tr. 111);
Testimony *Jos. M. Snow* (Tr. 103);
(Plaintiff's Exhibit 4).

The old Indian church was at that time located at the lower end of the village above the present church. (Testimony Tawes, Tr. 111, Plaintiff's Ex. 4). McDonough's store was originally situated near the upper end of the original Indian village.

Testimony *Tawes* (Tr. 112);
Testimony *Thos. Jefferson* (Tr. 76);

And continued at such place during 1878 and 1879 and 1880.

Testimony *Roeder* (Tr. 124).

Subsequently McDonough moved his store to at or about the point marked as "McDonough's Wharf" upon Exhibit 4. (Testimony Shields, Tr. 135). Allen's place is shown on plaintiff's Exhibit 4 to be approximately at the point where McDonough re-established himself. A large rock christened by the plaintiff's counsel during this trial as "Treaty" rock, lies slightly to the west of McDonough's wharf. (Plaintiff's Ex. 4). None of the white witnesses had ever heard of it being so designated prior to this trial.

Testimony *Snow* (Tr. 150);
Tawes (Tr. 113);
Roeder (Tr. 123);
Shields (Tr. 135);
Judson, (Tr. 141).

The so-called Zane river cut through the Hedge Donation Claim at a period subsequent to 1905.

Testimony *A. R. Campbell* (Tr. 81).

From at least 1859 and until the cutting through of the Zane river, the eastern mouth of the Nooksack river was at the cottonwood trees. At that point the waters of the river left its upland banks and mingled with the waters of the sea, separating into a number of little rivulets, distributing itself over the flats to the south and east of the cottonwood trees, but with the main channel and major portion of its volume flowing in a general southerly direction toward and by "Fish Point," shown on Exhibit 4, and the entire area lying south of the Hedge Donation Claim and east of the eastern boundary of the Reservation as shown by the Snow survey, constituted tide lands which were covered with salt water at ordinary high tide. These material facts are established by the following evidence:

Mouth of the River.

> "The shore line of the river as shown by my survey was along the front of the Indian village and then southerly and slightly southwesterly toward Point Francis. The mouth of the river as it existed at that time, I should say was about one-eighth of a mile below the store.
>
> "Q. (The Court): 'On which side was the store located then?'

"A. 'The store was located on the west side of the river in the Indian village.' "

Testimony *Snow,* (Tr. 5).

"Entered at the mouth of the Nooksack river at the village and changed canoes. (In 1872 or 1873).

Testimony *Roeder* (Tr. 117).

"In 1870 the mouth of the river was 'at the Catholic church, which is near the point of the cottonwood trees and cedar stump.' "

Testimony *Judson* (Tr. 141).

"Q. 'But you mean, as I understand, a point approximately at the cottonwood trees?'

"A. 'Yes; somewhere in that neighborhood, a little up above, probably.' "

Testimony *John S. Jones,* re conditions 1876. (Tr. 145).

Further and conclusive proof of such fact is found in the government field notes of the survey of the Hedge Donation Claim and other surveys introduced in evidence by plaintiff as its Exhibit No. 11.

After establishing the initial point of survey of the Hedge Donation Claim at the S. E. corner thereof, 5 chains W. of quarter section corner between sections 8 and 17, the surveyor followed what he termed the meander of the beach, first S. 1.75 chains; thence ½° North of West (N. 89½° W.) 35.15 chains to the corner, to the fractional sections 17 and 18, and thence 16½° South of West (S. 73½° W.) 24.18 chains to the *mouth of the LUMMI*

RIVER. (Page 1, Plaintiff's Exhibit 11). A reference to any of the exhibits in this cause admitted for either plaintiff or defendants, showing the Hedge Donation Claim and the sections referred to, will establish by actual measurement the mouth of the Lummi River referred to as at or near the cottonwood trees, and at or near the point where Steamboat Slough diverged from the main channel of the river as it then existed, being near the point where "Cedar stump," referred to by witnesses, is now located.

At p. 9, same Exhibit, this being Smith and Hurd's survey of 1859, the surveyors established a post at the corner to sections 7, 8, 17 and 18. This is a point about midway of the South boundary of the Hedge Donation Claim, and the surveyor, running north from that point, goes 6 chains north before leaving Tide Prairie and entering Willow Bush, showing that the established mark of the tide at that time was far North of the southern boundary of the Hedge Donation Claim. He then goes from the point where the willow bushes are encountered, 8½ chains north on same line and finds a trail to the *mouth of the Lummi River* running west. There can be no doubt that Smith and Hurd in 1859 identified the mouth of the Lummi river as being at a point at or near the cottonwood trees, four years after the Treaty was made.

On p. 10 of the notes, same exhibit, the same surveyors on July 18th, 1859 established temporary meander posts on the left and right banks of the Lummi river at a point 5.17 chains southeasterly of a random line between sections 7 and 18, extended from the section corner aforesaid, west 33.10 chains. They found the river on that date at that point to be 5.89 chains wide; a distance of nearly 400 feet.

On pp. 12 and 13, same exhibit, Smith and Hurd, in 1859, leaving the post on the southern boundary of the Hedge Donation Claim at the corner of fractional sections 17 and 18, found at that point beach, sand and gravel, showing that same was tide flats; thence running south 73½°, west from that point 24.18 chains they encountered the *mouth of the Lummi river.* A reference to any of the map exhibits in evidence and measurements by the scales thereon will show that they fixed the mouth of the Lummi river at a point at or near the cottonwood trees and at the lower end of the old village and church.

On pp. 15 and 16 of the Field Notes, the surveyor, whose identity is not established, on March 25th, 1892, re-established the corner of sections 7, 8, 17 and 18, this being the same point just before referred to. He then returned north on the line between sections 7 and 8 ten chains, at which point he left the tide lands, and at a point .50 chains farther

north he encountered a wagon road or trail to the mouth of the Nooksack river, course west. This shows that this surveyor identified the mouth as being at the same point established by Smith and Hurd in 1859 and Snow in 1873, and also identifies the Indian trail, then a wagon road leading to it; also that for a distance of 10 chains north from the corner of sections 7, 8, 17 and 18, the land in 1892 was tideland with a rise of only about two feet.

On page 40 of appellant's brief appears a statement to the effect that on page 2 of defendants' Exhibit 11 there is a reference to deep water in front of the Hedge Donation Claim. An examination will disclose that counsel is mistaken in such reference. The deep water there referred to was the deep water in the slough on the *north* boundary of the claim.

IN 1861 AND FOR MANY YEARS THEREAFTER, THE AREA LYING SOUTH OF THE COTTONWOOD TREES AND OF THE HEDGE DONATION CLAIM AND EAST OF THE EASTERN EXTERIOR BOUNDARY OF THE RESERVATION AS FIXED BY THE SNOW SURVEY, CONSTITUTED TIDE LANDS WHICH WERE COVERED WITH WATER AT ORDINARY HIGH TIDE, AND THE RIVER LEFT ITS UPLAND BANKS AT THE COTTONWOOD TREES AND SPREAD OUT OVER SUCH TIDE

LANDS WITH ITS MAIN FLOW IMMEDIATELY ADJACENT TO AND PARALLELING THE EASTERN EXTERIOR BOUNDARY OF THE RESERVATION, AS FIXED BY THE SNOW SURVEY.

These facts are established by the following evidence:

> Testimony *Snow,* (Tr. p. 95 to 99, inclusive, and 103-104);
> Testimony *Tawes* (Tr. 112);
> *Roeder,* pp. 122, 123, 124, 132
> *Shields,* p. 137;
> *Coupe,* p. 139;
> *Judson,* pp. 140-141;
> *Jones,* 145-156. ....

At page 3, Plaintiff's Ex. 11, the surveyor designates fractional N. W. of 17 and the principal part of N. W. of 18, as of little value, being chiefly a light, sandy beach. This is conclusive of our contention that at the time the treaty was made and until long after the Snow survey, the lands in dispute were tide flats covered with water at high tide, and carrying no vegetation.

Joseph M. Snow, in his survey of the exterior boundaries of the Reservation on October 20th, 1873, (pp. 21 and 22, Field Notes, Government Exhibit No. 11), ran a line through the north half of section 18 east along the edge of a mud flat at the lower end of

the Lummi village, and there placed a post for fractional section corner, using willows as his witness trees. It is apparent from this that no other tree growth existed there at that time and that the lands were of a marshy character supporting no growth except willows, as testified to by the witness Tawes and others for the defendants.

From the foregoing references to plaintiff's Exhibit 11, it is conclusively established, *First,* that the mouth of the Lummi river in 1859, in 1861, in 1873, and in 1892, was fixed at or near the two cottonwood trees on the southwest corner of the Hedge Donation Claim, and at a point at or near the lower end of the old Indian village, and that this was the point of comingling of the fresh waters of the river and the salt waters of bay.

Second, that in 1859, 1861, 1873 and as late as 1892, the southern portion of the Hedge Donation Claim was classified by the various surveyors as tideland; that the line of ordinary high tide was established by these competent and experienced surveyors as being far north of the southern boundary of the Hedge Donation Claim and that nothing but sandy beach lay south of this line and that same carried no vegetation whatsoever, except the willow clumps testified to by the various white witnesses, which willow clumps were just below and opposite the old Indian village.

No evidence was introduced as to use or occupancy for fishing, hunting or other purposes claimed to have been had at any time by the Indians to any part of the lands in controversy. The trial court was personally acquainted with nearly all of the witnesses, Indians as well as white men. (Trans. 152).

The only contrary testimony, to quote the language of the District Court, is "the bare statement of the Indians," (Tr. 31), and it will be observed that four of the Indian witnesses testified through the Indian witness, James, as interpreter.

Plaintiff's witness, Capt. Campbell, who made Plaintiff's Exhibit 4, prepared it from the statements made to him by such Indians and not from any knowledge of his own.

Testimony *Geo. R. Campbell* (Tr. 59).

He did not follow the field notes of the Snow survey—did not locate the initial point of the Snow survey—used several sets of Government field notes furnished him, without having any definite instructions to prefer one over the other. He makes no claim that Exhibit 4 is in any sense a copy of an official survey. He made no attempt to fix the mouth of the river from the standpoint of high water.

Testimony *Geo. R. Campbell* (Tr. 58).

In consequence, Exhibit 4 was limited in its admission by the District Court to the portrayal of the

conditions of the lands, but not as to the conclusions placed thereon in the designations "1855 to 1888 channel" and "Nooksack river, 1855 and present channel." (Tr. 92).

It is further worthy of note that the plaintiff's witness, Peter James, when asked:

> "Q. 'Was there some discussion among some of these old people—people now dead—as to the mouth of the river, as to where it was located?'—answered—
>
> " 'Yes. They were always debating in regard to that river, because there is a good many people has claimed that that new channel that was cut through the reservation was the original river, always been a river, and they were disputing.' "
>
> Testimony *James* (Tr. 71).

If it was a debatable question among the oldest inhabitants and "a good many" of them supported defendants' contention, we submit that a court would not be justified in accepting interested Indian testimony of the present day as against the field notes of the original disinterested surveyors supported by the testimony of disinterested white men.

The Law.

We submit we have conclusively established that the eastern mouth of the Nooksack river was, until the divergence of the Zane river in 1908, at the cot-

tonwood trees, and that the area involved in this action was, in 1859-1873 and for many years thereafter, wholly tide flats over which the tide ebbed and flowed and was covered with salt water at ordinary high tide, and that the main mud flat channel ran from the cotton wood trees in a southerly direction along and adjacent to the eastern exterior boundary of the reservation as established by the Snow survey of 1873.

There are three distinct theories, each of which sustain the decision of the District Court, which we will discuss under the following headings:

1. No part of the tidelands surrounding the reservation were ever granted to the Indians, but on the contrary were granted to the State.

2. The Snow survey is conclusive.

3. Assuming for the purpose of argument the Indians took to the lower water mark, no part of the lands in question was included.

No Part of the Tidelands Surrounding the Reservation Were Ever Granted to the Indians, But on the Contrary Were Granted to the State.

Under the treaty the reservation was limited to the following:

"And the *island* called Chah-Choo-Sen, sit-

uated in the Lummi river at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia."

Tide lands are not mentioned. There was no retention of privileges such as appears in the case of *U. S. vs. Winans,* 198 U. S. 371 cited by appellant under its "point one."

In the Winans case, the "exclusive right of taking fish, etc.," was secured to the Indians by the terms of the treaty and constituted the point upon which that case turned.

See Art. III., p. 378, *U. S. vs. Winans, supra.*

The Lummi treaty did not and could not include tidelands abutting upon such island, for assuming for the purpose of argument that the treaty constituted a grant, it is the rule that:

> "Grants by the United States of its public lands bounded on streams or other water, navigable or non-navigable, *made without reservation or restriction,* are to be construed according to their effect and according to the law of the state in which the land lies."

9 *Corpus Juris,* 181.

In the absence of the existence of a State at such time, such grant is limited to the line of high water mark.

Shively vs. Bowlby, 152 U. S. 1.
Barney vs. Keokuk, 94 U. S. 324.
U. S. vs. Pacheco, 2 Wallace, 587.
Mann vs. Tacoma Land Co., 153 U. S. 273.

In other words, the common law rule obtains, which is:

> "At common law the shore between high and low water marks belongs to the State, and consequently grants or conveyances of lands bounded on tide water are *presumed* to extend to high water mark only."
>
> 5 Cyc. 892-3.
>
> *Barney vs. Keokuk, supra.*

And it is, of course, the rule in this state that the upland owner takes to the line of ordinary high water mark only.

The tidelands being expressly excluded under the treaty by virtue of the legal presumption and the law above quoted, any claim, therefore, must of necessity rest solely upon Grant's executive order.

This order, it will be observed, fixes the point of commencement at the eastern mouth of Lummi river.

A mouth of a river is the point where it mixes with the arms of the sea.

Gould on Waters, 2nd Ed. Sec. 41.

Appellant on page 15 of tis brief asserts that the term "mouth of the river" is intended to fix the beginning of the line at the low-water mark citing

Wardell vs. Waterway District, 80 Wash. 495-9.

Maynard vs. Puget Sound Bank, 24 Wash. 455.

Snow vs. Mt. Desert Island Real Estate Co., 24 Atl. (Me.) 429.

In these cases the title had passed from the U. S. to private individuals, and the question was raised between such private individuals.

The distinction is made plain and set forth on pages 497-8 of the Wardell opinion.

The Nooksack river is navigable. (Trans. p. 93). In 1803 Congress provided:

> "All navigable rivers within the territory occupied by public lands shall remain and be deemed public highways."
>
> *Revised Statutes,* 1876, Sec. 2476.

The point of commencement under the executive order was, therefore, a point on the western side of the river where it mingled with the waters of Bellingham Bay. It will be observed that the point of commencement is not fixed at low water mark. Of necessity, therefore, under the law cited it must be fixed at the line of ordinary high water at such point. The last call of the executive order after leaving Point Francis reads: "Thence Northeasterly to the place of beginning." No mention is made of tide lands nor of low water mark in so far as the eastern boundary of the reservation is concerned, and in the absence of specific language to such effect, under the rule that the upland owner takes to the line of ordinary high water only, the limits of the eastern boudary would be the line of ordinary high water mark.

"It is a rule that a grant from the government will not be enlarged by construction."

Hill vs. Newell, 86 Wash. 227.

26 *Am. & Eng. Enc. Law,* 2nd Ed. 7, p. 425.

The argument of appellant on pages 29, 30 and 31 of its brief in support of which is cited *Dunton vs. Parker,* 54 Atl. (Me.) 1115-8, has no force under the foregoing rule.

In this connection, it will be observed that the President, under Section 6 of the treaty, possessed the right to remove the Indians from the reservation in toto, consolidate them with other friendly tribes or bands, or select other lands as a reservation in lieu thereof, and that the President in this case enlarged the reservation to the north and west to include a vastly greater area of upland, and which, as was disclosed by the testimony of Mr. Snow, was included in his instructions as to the particular lands to be by him surveyed, and that his survey followed literally the instructions which were given him; he testifying that he was given a map upon which the boundaries of the lands which he was directed to survey were delineated, and that his survey, as returned, conformed exactly to such map and such instructions.

Testimony *Snow* (Tr. 99-100).

Assuming that the executive order could be construed as attempting to include tidelands off the east-

ern boundary of the reservation, it was of no effect.

The aboriginal inhabitants of this country were not seized with titles to real estate.

Johnson vs. McIntosh, 8 Wheat. 543.
Butts vs. N. P. Railway Co., 119 U. S. 55.
U. S. vs. Ashton, 170 Fed. 509.

All of the exclusive rights of the Indians were terminated by the Oregon Donation Law and were relinquished by them by the treaty of 1854.

U. S. vs. Ashton, supra.

The Oregon country was acquired by the United States with the object in view of creating new states to be admitted into the Union upon an equality with the original states, and until the states now existing within that country were organized and admitted into the Union the National Government held the tile to the shores and beds of navigable waters therein as trustee for the future states.

Pollard vs. Hagen, 3 Howard, 212.
Shively vs. Bowlby, 152 U. S., 1.
U. S. vs. Ashton, supra

Neither the reservation nor the executive order were grants.

U. S. vs. Ashton, supra.
U. S. vs. Moore, 161 Fed. 513.

Under the treaty it is provided and contem-

plated that a survey and allotment shall be made by the language reading:

> " * * * * all of which tracts shall be set apart and so far as necessary surveyed and marked out for their exclusive use * * * *."

No title vested in the Indians until allotment and issuance of patents in severalty. Prior to such time they held mere possessory uses for subsistence.

State vs. Towessnute, 89 Wash. 478.

Herein again appears the distinction which shows the inapplicability of the United States against *Winans,* 198, U. S. 371.

In the *Winans* case an easement or privilege of fishing at a certain point on the Columbia river was expressly reserved by the Indians under their treaty. In the *Lummi* case, as we have shown, the tidelands were not reserved. The *Winans* case turned wholly on the treaty. The *Lummi* case, in so far as the claim for tidelands is concerned, must rest upon the Presidential executive order. Not having reserved any rights to the tidelands in the treaty, the Indians by virtue of the treaty possessed no rights therein, and rights therein, if any were created, came into being, not by virtue of a treaty reservation but by an independent act of the President operating upon rights previously relinquished to the United States Government by the Indians, and which order, as we have

shown, was in no sense a grant or any sense irrevocable, and which under the law authorizes the President to promulgate such executive order was to be followed up, and which was followed up, by an actual marking upon the ground by Government surveyors of the lands finally determined upon as such reservation.

The Enabling Act vested in the State of Washington the title formerly held in trust for it by the Federal Government in the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide. Sec. 1, Art 17, Wash. Const.

While it is true that the state disclaimed all right and title to lands owned or held by any Indian or Indian tribes, such disclaimer would have no application here for—

> "Any disposition of proprietary rights in the seashore by the government of the United States, being obnoxious to the firmly established principle that control of the seacoast is an attribute of sovereignty appertaining to the states, could only be valid, if valid at all, by virtue of the exercise of the power vested in Congress to be exercised for the national welfare, and there is no pretext set forth in the bill of complaint or stated in the argument of the complainants' solicitors that any proprietary right to shore lands became vested in the Puyallup tribe as a community by virtue of any provision, expressed or implied, of any act of Congress whatever. The

treaty of 1854 was not in any sense a conveyance of title to any of the lands in controversy to the Puyallup Indians; on the contrary, the treaty was a relinquishment by said Indians of whatever rights to these lands may have been theretofore claimed by them. For the reasons already stated, the President could not grant shore lands by the making of an executive order designating the tract of land to be held as a reservation, and the executive orders made by President Pierce and President Grant, referred to in this opinion, cannot by any rule of interpretation or construction be made to express an intention, on the part o feither President, to effect an object other than that of setting apart land for the use of the Indians for whatever period of time it might be required for such use, and the orders referred to do not purpose to fix the boundaries of the reservation irrevocably or permanently. They were made in the exercise of authority expressly assented to by the Indians in the treaty of 1854, vesting in the President the power to change and relocate the reservations, and by the approval of the survey and platting of the reservation, which was in legal effect the act of the President, the western boundary originally indicated by the straight line of Governor Stevens' map was changed to a line following the sinuosities of the shore at ordinary high tide."

U. S. vs. Ashton, supra.

and as we have already shown, no rights in and to the tidelands were reserved by the treaty.

There is no evidence that any lands outside of the exterior boundaries, as shown by the Snow survey, were even claimed to be owned, held or used by such Indians, or that the treaty was understood by the Indians as including any part of the lands here involved.

Testimony *Snow* (Tr. 149-50).

The Snow survey was returned and approved as a matter of public record and constituted the final act of the President of the United States subsequent to his executive order and modifying his executive order to such extent if the call in such executive order to low water mark on the Gulf of Georgia had been of any effect.

U. S. vs. Ashton, supra.

Such call was of no effect for as stated by the trial court (Tr. 32):

> "As the description commenced at the mouth of the Lummi river, which is a point where the fresh water mingles with the waters of the sea * * * no effect can be given to the words 'low water mark on the Gulf of Georgia,' as the boundary could not be low water on one side of the island and high water on the other."

Such disclaimer would have no application for the further reason that to include such tidelands within the reservation would deprive the state of jurisdiction thereof, and this court will take judicial knowledge of the fact, stipulated herein, that the lands claimed lie at the mouth of the Nooksack river (a navigable stream) (Tr. 93), and that on the tideflats in front of the same fishing has become a state industry of great magnitude, and that salmon run up such river to spawn. To hold that such tidelands

were included within the reservation would be to limit the police power of the state.

> "Congress, by an act admitting a State into the Union on equal terms with its sisters, was adjudged to have revoked and to have the right to revoke whatever in the treaty itself may have impaired the police power."
>
> *State vs. Towessnute, supra.*
> *Ward vs. Racehorse,* 163 U. S. 504.

Under the contention of the appellant, it having been disclosed by the evidence that a navigable channel of the river runs along the eastern boudary of the reservation, as shown by the Snow survey, such navigable stream would be a part of the reservation and wholly without the state jurisdiction.

The Snow Survey is Conclusive

As heretofore shown, neither the treaty nor the executive order constituted grants so as to vest any proprietary right in the Indians. Under the treaty of 1854 the President was empowered to change and relocate the reservations.

U. S. vs. Ashton, supra.

The survey in the Lummi case was made under the same authority and in pursuance to the same appropriation as that referred to in the Ashton case. In the Ashton case one of the boundaries claimed was a straight line between points of upland, which would

include a large portion of the tidelands of Commencement Bay.

The reservation, including tidelands, was actually surveyed, mapped out, and in 1857 by an executive order of President Pierce set apart as a reservation. Subsequently in 1873 President Grant extended the reservation but did not modify the particular boundary in question. Subsequently the reservation was surveyed for allotment and platted and allotted to the Indians in severalty, and patents issued therefor, which survey and platting was pursuant to authorization by Congress in like manner as was done with the Lummi reservation. This survey for allotment, however, disregarded the straight line on the west boundary and followed the sinuosities of the shore in conformity to the general system of land surveys, so that only the land above the line of ordinary high tide was included in the reservation and platted. It will thus be observed that in the Ashton case a survey *which included tidelands* was made prior to the Presidential executive order and the executive order followed such survey.

In the Lummi case no survey was ever made that included the lands in controversy.

In the Ashton case the final survey which followed the sinuosities of the shore at high tide and omitted the tidelands, became a public record in the

General Land Office of the United States in the year 1874, the same year that the Snow survey was approved and became a matter of public record. The court holds that the approval of the survey and platting of the reservation constituted in legal effect the act of the President. We quote the language in such connection:

> "They (referring to the treaty and Presidential executive orders) were made in the exercise of authority expressly assented to by the Indians in the treaty of 1854 vesting in the President the power to change and relocate the reservations, and by the approval of the survey and platting of the reservation, which was in legal effect the act of the President, the western boundary originally indicated by the straight line of Governor Stevens' map was changed to a line following the sinuosities of the shore at ordinary high tide."

In the Lummi case we have an additional recognition and ratification in the approval of the Stewart survey in 1884, which it will be observed fixed the exterior boundaries in accordance with the Snow survey.

No credible evidence has been introduced to in any way impeach the Snow survey (if it were in fact subject to impeachment, which we deny), and in addition to the evidence of the white settlers introduced in this case we are entitled to indulge the presumption that:

"In the case of official surveys it will always be presumed that the surveyor did his duty and that his work was accurate."

9 *Corpus Juris*, 272.

ASSUMING FOR THE PURPOSE OF ARGUMENT THAT THE INDIANS TOOK TO THE LOW WATER MARK, NO PART OF THE LANDS IN QUESTION WERE INCLUDED.

Testimony of the defendants' witnesses established that the main tideflat channel extended down adjacent to the eastern shore of the reservation as marked out and fixed by the Snow survey, and that the river at that point constituted a navigable channel, always containing water at low tide.

Such being the case, such channel was not tideland, but land below low water mark.

State vs. Scott, 89 Wash. 63.

We have heretofore shown that the title to the navigable streams was reserved in the public for public highways by the United States Government as early as 1803.

The court will take judicial knowledge of the fact that the Nooksack river has long been a subject of Federal jurisdiction and control. The bed in which it was confined in its flow at low water through the tideflats constituted a navigable channel, was always covered by water at low tide and constituted an eastern barrier or low water limit to the eastern shore of

the reservation; in other words,—the low water mark of the tidelands intervening between such river channel and the reservation as delineated upon the Snow survey would terminate at the line of ordinary low water mark in such navigable salt water channel.

> "Where a power possesses a river and cedes the territory on the other side of it, making the river the boundary, that power retains the river unless there is an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river."
>
> *Howard vs. Ingersoll,* 13 How. 381.

If then, it be conceded for the purpose of argument that the Indians took to low water mark on the eastern side of the reservation, they would run from Point Francis to an intersection with the western low water mark of the tideflat channel which ran along the eastern portion of the reservation towards Point Francis as marked by the Snow survey and as testified to by the defendants' witnesses, and thence along such channel on the western side at the line of ordinary low water mark to the point of commencement at the actual mouth of the river, to-wit, where it left its upland banks, for no claim could be made to the bed of a navigable channel, for the lands lying in a bed of such channel are not tidelands and could not be included under any theory.

The impracticability and unfairness of the plain-

tiff's contention in such connection is illustrated by the fact that the claim asserted would include all tidelands lying in front of the Hedge Donation Claim southeastward to a point which they have designated as Treaty Rock. In other words,—they regard the Hedge Donation Claim as not possessing any tidelands along its southern boundary, but that all the tidelands from Treaty Rock to Point Francis are a part of the reservation.

Stress has been placed by appellant upon certain hydrographic maps introduced by plaintiff, as constituting data corroborating the Indian testimony and showing the river to run out past Treaty Rock to the tidelands. Such maps plainly disclose that the channels there delineated are on tidelands and that all the lands in controversy were tidelands and not uplands at the time of the making of the survey, and that the greatest depth of water was at the point on the eastern shore of the reservation where the channel testified to by defendants' witnesses was located. The court will observe at that point the figure "9," and that the greatest depth to the easteward is from two to three feet. However, such hydrographic maps are of no value as against the surveys made by Snow and by Stewart, for in the latter case such surveys were returned with field notes from which a surveyor could go upon the ground and verify the correctness of the survey and the accuracy of the map returned thereof.

Without such field notes no means exist of verifying the correctness of any map return and it has long been held by the courts that without such field notes a mere map is of no value as evidence.

"In *Convers vs. Railroad Co.*, 18 Mich. 466, it was said: 'We understand by 'map and survey,' not only a delineation on paper or other material, giving a general or approximate idea of the situation of the road, but also such full and accurate notes and data as are necessary to furnish complete means for identifying and ascertaining the precise position of every part of the line, with courses and distances throughout, so that there can be no doubt where any portion of it is to be found. A map can be made to contain all these data, so as to need no reference to field notes, but the information must exist somewhere. The map before us is singularly deficient. It purports to be drawn by a scale, but the lines of the road are not so laid down as to enable any one by the use of instruments to ascertain its location with any degree of accuracy. There is nothing to show its distance from corners or other boundaries at any part of the line. There are no courses or distances given, either on straight lines or on curves.' In the case before us, as before stated, the description in the complaint does not indicate whether the line of the road sought to be condemned is straight or curved, and the judgment follows the language of the complaint. The map shows that a portion of the line is curved. but the map is neither copied nor referred to in the judgment, which becomes the evidence of title of the railway company, so that if a surveyor were to take the judgment, and go upon the land, it would be impossible for him to locate the line of the road between the two engineers' stations there named, or, if these were destroyed, he could only determine that the right

of way entered appellant's land somewhere on the northwest side, and left it somewhere on the east side. It is true, the complaint alleges 'that said railroad has been definitely located by plaintiff over and through the parcel of land hereinafter described;' but it is not shown or alleged that it was marked upon the ground by stakes, or in any manner, other than the mention of two 'engineers' stations,' nearly a mile apart, with no intimation as to whether the line between them is straight or curved, though the map shows that a portion of the line is curved, but the radius of the curve, or where it begins, cannot be accurately determined by the map."

San Francisco vs. Gould, 55 Pac. 411.

As stated by the District Court, such maps are of no weight "in contradiction to the evidence that is presented, including the surveys that were made and the actual conditions upon the ground as delineated by the testimony of the witnesses." (Tr. 33).

We respectfully submit that the decree should be affirmed.

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